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Supreme Court, U.S.
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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

PIPER AIRCRAFT CORPORATION

Petitioner,

v.

EDWARD CHARLES CLEVELAND,
by and through the Conservator
of his Estate, Kathleen Cleveland,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 30, 1993

QUESTION PRESENTED

Whether the Federal Aviation Act of 1958 and Federal Aviation Administration ("FAA") regulations thereunder, which prescribe safety standards for aircraft design, preempt state common-law tort claims that seek to impose liability on aircraft manufacturers for utilizing aircraft designs determined by the FAA to be safe and in full compliance with all applicable federal aircraft standards.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner and defendant below is Piper Aircraft Corporation, a Pennsylvania corporation, currently a debtor-in-possession under Chapter 11 of the United States Bankruptcy Code in Case 91-31884-BKC-RAM in the United States Bankruptcy Court for the Southern District of Florida.[1] Appearing as amici curiae in support of Piper below were (1) the United States of America; (2) the Aircraft Owners and Pilots Association; and (3) the General Aviation Manufacturers Association.

Respondent and plaintiff below is Edward Charles Cleveland, by and through the Conservator of his Estate, Kathleen Cleveland. Appearing as amicus curiae in support of Cleveland below was the Association of Trial Lawyers of America.

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[1] Pursuant to SUP. CT. R. 29.1, petitioner Piper Aircraft Corporation states that its parent company is Romeo Charlie, Inc., and that it has no non-wholly owned subsidiaries.

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In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, dated February 16, 1993, is reported at 985 F.2d 1438, and reprinted in petitioner's Appendix ("App.") at 2a. The unpublished order of the court of appeals, dated April 5, 1993, denying petitioner's timely petition for rehearing is reprinted at App. 27a. The unpublished memorandum opinion of the United States District Court for the District of New Mexico, dated February 12, 1991, is reprinted at App. 30a. The unpublished order of the court of appeals, dated March 14, 1991, granting petitioner permission to appeal from the district court's denial of its motion for summary judgment pursuant to 28 U.S.C. § 1292(b) (1988), is reprinted at App. 42a. Earlier opinions of the court of appeals in this case are reported at 890 F.2d 1540 (10th Cir. 1989), *reh'g denied*, 898 F.2d 778 (10th Cir. 1990), and reprinted at App. 45a and 81a, respectively.

JURISDICTION

This Court has jurisdiction to review the judgment below by a writ of certiorari pursuant to 28 U.S.C. § 1254 (1988). The judgment of the court of appeals was entered on February 16, 1993. App. 2a. The order of the court of appeals denying petitioner's timely petition for rehearing was entered on April 5, 1993. App. 27a. This Petition is timely pursuant to 28 U.S.C. § 2101(c) (1988), and SUP. CT. R. 13.4.

CONSTITUTIONAL PROVISION AND STATUTE

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, and section 601(a) of the Federal Aviation Act of 1958, 49 U.S.C. App. § 1421(a) (1988), are reprinted at App. 87a and 89a, respectively.

STATEMENT

The Accident

This case arises from a bizarre collision in 1983 between a Piper Super Cub, manufactured by petitioner Piper Aircraft Corporation ("Piper"), and a GMC van on the runway of a residential airpark in Los Lunas, New Mexico. The airpark owner had parked the van on the runway to prevent the Super Cub's take-off. The Super Cub, piloted from the rear seat by respondent Edward Cleveland ("Cleveland"), was towing a sailplane and accelerating for take-off when it ran into the parked van. Cleveland had intended to tow the sailplane into flight and, when both planes were airborne, to film the sailplane for a television commercial. He had removed the Super Cub's front seat, installed a large movie camera in its place, and seated the cameraman on two-by-fours facing rearward with his back against the instrument panel and front window. When the Super Cub struck the van, Cleveland hit his head on the camera mount and was seriously injured.

The Super Cub model received its Type Certificate from the Civil Aeronautics Administration ("CAA") in 1949; the Type Certificate was reissued by the Federal Aviation Administration

("FAA") in 1974. The 1970 Super Cub involved in this case received its FAA Airworthiness Certificate in March, 1970. These certificates evidence this Super Cub's compliance with all applicable federal design safety standards including those relating to pilot visibility and seat restraint systems. In this action against Piper, Cleveland claims that the Super Cub was negligently designed because (1) its tailwheel, tandem seat (fore and aft) design limited forward visibility from the rear seat during the beginning of takeoff;[2] and (2) the rear seat was equipped with a seat belt but not a shoulder harness.

Federal Regulation of Aircraft Design

Air commerce is inherently national and the design safety of a specific airplane is inherently a matter appropriate for regulation by a single expert agency: safe design involves interrelated aerodynamic and structural considerations that need to be evaluated in the context of the entire design. This is why, for more than 60 years, the Federal Government has occupied the field of aircraft design safety and state legislatures have acknowledged this exclusive federal role.

The Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926) (repealed 1938) ("the 1926 Act"), gave the Secretary of Commerce broad authority to promote and regulate civil aviation. It delegated to the Secretary the power to regulate the

> full particulars of the design [of aircraft] and of the calculations upon which the design is based

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[2] All general aviation aircraft use either a nosewheel or tailwheel design. Tailwheel aircraft, while on the ground, rest on forward main landing gear and on a small wheel under the tail. In that position, the fuselage slants upward, restricting the pilot's forward field of vision, particularly in single engine aircraft with the engine in the nose. There are over 54,000 single engine, tailwheel aircraft in service in the United States general aviation fleet. *See* FEDERAL AVIATION ADMINISTRATION, U.S. DEP'T OF TRANSP., CENSUS OF U.S. CIVIL AIRCRAFT A-3 through A-71 (1991).

and of the materials and methods used in the construction[.]

44 Stat. 569. Pursuant to the 1926 Act, the Commerce Department promulgated the first federal airworthiness standards for aircraft.

Because of then prevailing views of the scope of the Commerce power, the 1926 Act regulated only aircraft operating in "interstate and foreign commerce" and left intrastate flying to the States. *See* S. Rep. No. 2, 69th Cong., 1st Sess., 8 (1925), *reprinted in* CIVIL AERONAUTICS: LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926 at 29 (Rev. ed 1943). Congress, however, recognizing the need for uniform national standards, urged the States to adopt "uniform laws and regulations corresponding with the provisions of [the 1926 Act] and the rules and regulations that will be promulgated under it . . .." *Id.* The States, also recognizing the need for uniform national aircraft regulation, enacted legislation adopting the governing federal standards.

For example, in New Mexico where the accident involved in this case occurred, the state legislature in 1929 enacted a law that specifically cites the need for "uniform" air safety standards and makes it unlawful to operate an aircraft within the State unless it is licensed and registered by the United States in accordance with the *federal* standards governing design, construction and airworthiness. N.M. STAT. ANN. § 64-1-2 (Michie 1987).[3] This New Mexico statute was based on the

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[3] Section 64-1-2 provides:

> The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards prescribed by the United States government with respect to navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner

Uniform State Air Licensing Act, one of several model uniform acts proposed during the 1920s and early 1930s to assure uniform aviation laws throughout the nation. *See generally* BUREAU OF AIR COMMERCE, U.S. DEP'T OF COMMERCE, AERONAUTICAL BULLETIN NO. 18, STATE AERONAUTICAL LEGISLATION DIGEST AND UNIFORM STATE LAWS (1936). The impetus for these model uniform acts was the accepted view that: "[i]nasmuch as there can be but one standard of airworthiness, only a limited range of piloting ability, and no variation in rules, then it would seem obvious that State laws dealing with regulation should provide requirements identical with those of the Federal law." *Id.* at 2. Forty-seven other States have identical or substantially similar statutes.[4] In this

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prescribed by the lawful rules and regulations of the United States government then in force.

See Security Mut. Cas. Co. v. O'Brien, 662 P.2d 639, 642 (N.M. 1983) (in § 64-1-2, New Mexico has declared the Federal Aviation Regulations "to be part of the law of the state").

[4] *See* ALA. CODE § 4-2-72 (1981); ALASKA STAT. §§ 02.10.010, 02.15.030, 02.35.010 (1988); ARIZ. REV. STAT. ANN. § 28-1741 (1989); ARK. CODE ANN. §§ 27-115-108, 27-116-202 (1987); CAL. PUB. UTIL. CODE §§ 21241, 21411 (West 1965 & 1993 Supp.); COLO. REV. STAT. § 41-1-103 (1984); CONN. GEN. STAT. §15-54 (1993); DEL. CODE ANN. tit. 2, §§ 101, 134(c), 161(3) (1985); FLA. STAT. ANN. § 329.10 (1) (West 1991); GA. CODE ANN. §§ 6-2-1, 6-2-9 (1982); HAWAII REV. STAT. §§ 261-12(d), 261-15(a) (1992 & 1992 Supp.); IDAHO CODE §§ 21-111(b), 21-113(a) (1977); ILL. ANN. STAT. ch. 15 1/2 para. 22.25, 22.29, 22.42 (Smith-Hurd 1963 & 1992 Supp.); IND. CODE ANN. §§ 8-21-1-2, 8-21-1-8(c), 8-21-2-2 (Burns 1991); IOWA CODE ANN. § 328.34 (West 1985); KAN. STAT. ANN. §§ 3-202, 3-203 (1991); KY. REV. STAT. ANN. § 183.050 (Michie/Bobbs-Merrill 1989); ME. REV. STAT. ANN. tit. 6, §§ 2(3), 12, 202(2) (1989); MASS. ANN. LAWS ch. 90, §§ 39, 48 (Law. Co-op 1985); MICH. STAT. ANN. §§ 10.101, 10.176(1), 10.180 (Law. Co-op. 1991); MINN. STAT. ANN. §§ 360.011, 360.015(4), 360.018 (West 1991); MISS. CODE ANN. §§ 61-1-1, 61-1-13(8), 61-1-15(2) (1989 & 1992 Supp.); MO. ANN. STAT. §§ 305.070, 305.130 (Vernon 1972); MONT. CODE ANN. §§ 67-1-102, 67-3-201(1) (1991); NEB. REV. STAT. §§ 3-102, 3-110, 3-129 (1991); NEV. REV. STAT. ANN. §§ 493.120,

manner, since the early 1930s, the federal design standards have effectively governed the designs of all U.S. aircraft, whether used in interstate or exclusively intrastate commerce. *See* NICK A KOMONS, U.S. DEP'T OF TRANSP., BONFIRES TO BEACONS: FEDERAL CIVIL AVIATION POLICY UNDER THE AIR COMMERCE ACT 1926-1938 at 122 (1978).

Thus, since the early days of aviation, aircraft design standards have not been an area of traditional state police power regulation. Rather, both Congress and the States have recognized and accepted the need for uniform federal standards.

The 1926 Act was followed by the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (repealed 1958) ("the 1938 Act"), which effectively extended federal jurisdiction over intrastate flying. The need for uniform federal aviation safety standards was by then so well accepted that there was no suggestion of any state role in aircraft design standards, *see* KOMONS, *supra*, at 369-70, and Congress extended the scope of federal regulation to all aircraft in "air commerce," § 1(3) of the 1938 Act, 52 Stat. 977, a phrase understood to subsume interstate and intrastate flight. *See Rosenhan v. United States*,

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493.150 (Michie 1986); N. H. REV. STAT. ANN. §§ 422:2, 422:34 (1991); N. J. STAT. ANN. §§ 6:1-29, 6:1-35 (West 1988); N.Y. GEN. BUS. LAW § 243 (McKinney 1988); N. C. GEN. STAT. § 63-22 (1985); OH. REV. CODE ANN. § 4561.05, 4561.06, 4561.14 (Anderson 1990); OKL. STAT. ANN. tit. 3, § 258 (West 1993); R. I. GEN. LAWS § 1-4-4 (1987); S. C. CODE ANN. §§ 55-5-70, 55-5-90 (Law. Co-op 1992); S. D. CODIFIED LAWS ANN. §§ 50-2-13, 50-11-1 (1992 Supp. & 1993 Int. Supp.); TENN. CODE ANN. §§ 42-2-102, 42-2-104 (1987); TEX. REV. CIV. STAT. ANN. art. 46f-2, Sec. 2 (West 1993 Supp.); VT. STAT. ANN. tit. 5, §§ 203, 207(b) (1988); VA. CODE ANN. §§ 5.1-14, 5.12.15 (Michie 1988); WASH. REV. CODE ANN. §§ 47.68.010, 47.68.230 (1986 & 1993 Supp.); W. VA. CODE § 29-2A-14 (1992); WIS. STAT. ANN. § 14.18 (West 1988); WYO. STAT. ANN. § 10-4-201 (1978); *see also* LA. REV. STAT. ANN. §§ 2:2.9(A), 2:3, 2:6(B)(2) (West 1987); MD. CODE ANN., TRANSP. §§ 5-102(a)(2), 5-208(b)(2) (1993); 74 PA. CONS. STAT. ANN. § 5301(d) (Supp. 1992); UTAH CODE ANN. § 2-1-7.5 (1992 Supp.).

131 F.2d 932, 934-35 (10th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943).

The current federal statute, the Federal Aviation Act of 1958, 49 U.S.C. App. §§ 1301-1557 (1988 & 1991 Supp.) ("the 1958 Act"), created the Federal Aviation Agency[5] and dealt with the two distinct subjects: flight safety, which was made the responsibility of the newly created FAA; and economic regulation of commercial airlines, which was the responsibility of the Civil Aeronautics Board ("CAB"). The FAA's responsibility for flight safety includes certification of aircraft, pilots and mechanics, aircraft maintenance requirements and establishment of a national airways system governing civil and military flight operations.

The Senate Report on the 1958 Act emphasized the Federal Government's virtually complete responsibility for aviation:

> [A]viation is unique among transportation industries in its relation to the Federal Government -- it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.

S. Rep. No. 1811, 85th Cong., 2d Sess., 5 (1958). The House Report made clear that Congress intended to give the FAA "full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations," and "plenary authority to . . . [m]ake and enforce safety regulations governing the design and operation of civil aircraft." H.R. Rep. No. 2360, 85th Cong., 2d Sess., 1-2 (1958), *reprinted in* 1958

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[5] In 1966, the Federal Aviation Agency was renamed the Federal Aviation Administration and made part of the Department of Transportation. Both are referred to as the "FAA."

U.S.C.C.A.N. 3741, 3741-42. The FAA was given such "plenary authority" because Congress deemed it "essential that one agency of government, and one agency alone, be responsible for issuing safety regulations . . .." 1958 U.S.C.C.A.N. at 3761.

Accordingly, section 601 of the 1958 Act, as amended, provides:

> The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time
>
> (1) Such minimum standards governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety[.]

49 U.S.C. App. § 1421(a)(1988).

Pursuant to this congressional mandate, the Secretary, through the FAA, has established a "comprehensive set" of Federal Aviation Regulations ("FARs"), *see United States v. Varig Airlines*, 467 U.S. 797, 804-05 (1984), governing, *inter alia*, aircraft design, including in-flight performance and handling characteristics, structural and power plant requirements, and required safety equipment. 14 C.F.R. pt. 23 (1992) (§§ 23.1 to 23.1589).

The 1958 Act, like the 1938 Act, provides for a three-level federal certification process. To introduce a new aircraft, a manufacturer first must obtain a "Type Certificate" reflecting the FAA's determination, after investigation and testing, that the proposed aircraft is of proper design for safe operation and that the design meets applicable federal airworthiness standards. 49 U.S.C. App. § 1423(a) (1988); 14 C.F.R. § 21.21 (1992). To mass produce an aircraft that has received a Type Certificate, a manufacturer next must obtain a "Production Certificate" evidencing the FAA's determination that the manufacturing process has sufficient quality control that it will produce airplanes conforming to the approved design. 49 U.S.C. App. §

1423(b) (1988); 14 C.F.R. §§ 21.139, 21.143 (1992). Finally, before any particular airplane may be placed in service, an "Airworthiness Certificate" must be obtained from the FAA indicating that the specific airplane conforms to the Type Certificate and is in a condition for safe operation. 49 U.S.C. App. § 1423(c) (1988); 14 C.F.R. § 21.183 (1992). It is unlawful to operate an aircraft without an effective Airworthiness Certificate. 49 U.S.C. App. § 1430(a)(1) (1988).

FAA rules provide for a detailed monitoring of the subsequent service history of an aircraft. In light of the service history, the FAA may issue an "Airworthiness Directive" ("AD") requiring a change in an aircraft design and suspend or revoke a Type Certificate or an individual aircraft's Airworthiness Certificate until the corrective measures required by the AD are taken. 14 C.F.R. § 39.1 (1992). Manufacturers are required to incorporate the design change mandated by an AD into all new aircraft produced after the effective date of the AD. Operators of existing aircraft are required to have their aircraft modified to comply with the design change mandated by the AD.[6] The objective of these regulations is to provide a safe airplane from its certification through its operational life.[7]

The Piper Super Cub and Its Design

The Piper Cub is a venerable airplane. The original Cub, the model J-3, first manufactured in 1937, is a small, single engine, high wing, tailwheel, tandem seat aircraft with flight controls at both seats. From 1937 through 1947, over 14,000 J-3 Cubs were made and sold. A 1938 Cub has been displayed at the National Air and Space Museum, a testament to

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[6] Federal regulations also provide that any interested party (including airplane owners, operators or passengers) may petition the FAA for changes in federal design and safety standards. *See* 14 C.F.R. pt. 11 (1992).

[7] The FAA must approve significant modifications to in-service aircraft. The modifications made by Cleveland to the Super Cub in this case did not have FAA approval, violated several applicable FARs and resulted in the FAA's suspension of Cleveland's pilot license.

the aircraft's popularity and impact on the development of aviation. In 1940, Piper began making a military version of the Cub, the model L-4, and nearly 6,000 were used extensively during World War II as trainers, spotters, transports, ambulances and reconnaissance aircraft. In the J-3 and the L-4 models, pilots had to solo from the rear seat because these aircraft were too "nose heavy" to permit soloing from the front seat. Thousands of pilots received their dual instruction and made their first solo flights from the rear seats of these two "tail dragger" models.[8]

Most aircraft utilized before and during World War II, including Allied and Axis fighter planes, used the tailwheel design despite the restricted forward visibility typical of all single-engine tailwheel aircraft while the tailwheel is on the ground. A tailwheel design is advantageous for take-offs from short airfields because these airplanes are able to take off at lower speeds and in less distance, and for operation on rough or soft terrain because with the nose up, propeller ground strikes are minimized. The Cub design is particularly suitable for slow flight, short take-offs and landings, flight instruction, traffic control, glider towing, and power line, pipeline and forest fire patrol. Cubs can be equipped with wheels, skis or floats.

The Super Cub is a post-World War II version of the Piper Cub.[9] Piper introduced the Super Cub in 1949 and since has sold some 10,000. The Super Cub has the same classic single engine, high wing, tailwheel, tandem seat design as the J-3 and L-4 Cubs. However, while a solo pilot in the J-3 and L-4 models had to sit in the rear seat, the Super Cub has a center of gravity that permits it to be soloed from either the front or rear seat. The Super Cub's Type Certificate and this particular Super Cub's Airworthiness Certificate evidenced this aircraft's compliance with all applicable federal safety requirements

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[8] See Affidavit of Fred E. Weick, dated November 26, 1990, submitted by Piper in support of its motion for summary judgment and reprinted at App. 91a.

[9] Photographs of the Cub and Super Cub are found behind App. 103a and 104a, respectively.

including those relating to pilot visibility and seat restraint systems. Federal regulations specifically authorize tailwheel, tandem seat aircraft with their inherent preflight forward visibility limitations, and the CAA and FAA have never restricted rear seat operation of these aircraft.[10]

The 1970 Super Cub had seat belts as required by, and in full compliance with, federal safety regulations dealing with seat restraint systems.[11] In 1973, the FAA proposed a rule that would make shoulder harnesses mandatory in new aircraft and in in-service aircraft that had structural provisions for harnesses as did the Super Cub.[12] 38 Fed. Reg. 2985-86 (1973). There was strong opposition from small aircraft pilots to the proposed rule. After extensive study, the FAA issued a final rule in 1977 requiring shoulder harnesses only in front seats of aircraft manufactured after July 18, 1978. 42 Fed. Reg. 30,601 (1977). The FAA expressly determined that shoulder harnesses should not be required for the rear seat and that the decision whether to install shoulder harnesses in aircraft then in service and in seats other than the front seat in new aircraft should be left to the owner.[13]

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[10] See Affidavit of Herbert M. Toomey, dated November 27, 1990, submitted by Piper in support of its motion for summary judgment and reprinted at App. 95a. The CAA and then the FAA also have been responsible for pilot training and certification, including the instruction given to tailwheel aircraft pilots in how to insure that the runway is clear for take-off and the side-to-side weaving ground maneuvers used to overcome preflight forward visibility limitations. *Id.* at 96a-97a.

[11] See Affidavit of Richard F. Chandler, dated November 27, 1990, submitted by Piper in support of its motion for summary judgment and reprinted at App. 99a.

[12] All Piper Super Cubs have attach points so that shoulder harnesses easily can be installed in both the front and rear seats. The owner of this Super Cub had installed a shoulder harness in the front seat but not the rear seat.

[13] The FAA concluded:

Proceedings Below

Cleveland first sued and settled with the airpark owner who had parked the van on the runway. He then brought this diversity action against Piper alleging two design negligence claims under New Mexico common law. Cleveland did not contend that the Super Cub was not properly certificated or that it failed to meet any federal design safety standard applicable when it was manufactured in 1970, when the accident occurred in 1983, or today. He claimed that the Super Cub was negligently designed because the tandem seat, tailwheel design limits preflight forward visibility, that a nosewheel design and side-by-side seating should have been utilized, and that a rear seat shoulder harness should have been installed. Based on these contentions, the jury returned a verdict that resulted in a $1,042,500 judgment against Piper.

On an initial appeal, the Tenth Circuit vacated on state law grounds and remanded for a new trial. App. 45a. On

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> [A] number of comments received in response to Notice 73-1 indicated strong opposition to a rule requiring the installation of shoulder harnesses in small airplanes currently in service. In light of these comments, a cost analysis was conducted by the FAA which indicated that a substantial financial burden would be imposed upon many consumers over a short period of time if the proposals were to be adopted. Based on this cost analysis and a review of the benefits expected from the proposal, *the FAA has determined that the decision of whether to install shoulder harnesses in small airplanes now in service or to install shoulder harnesses at seats other than front seats should be left to the owner.* Therefore, the proposal has been revised to require the installation of shoulder harnesses only on the front seats of airplanes that are manufactured after one year after the effective date of the amendment.

Federal Aviation Regulations, Amendment 23-19, 42 Fed. Reg. 30,601, 30,602 (1977) (emphasis added).

remand, Piper obtained leave of the district court, pursuant to FED. R. CIV. P. 15(a), to raise the defense that Cleveland's two design negligence claims are preempted by federal law. Piper's subsequent motion for summary judgment on preemption grounds was denied by the district court. App. 29a. The district court certified and the court of appeals permitted Piper's interlocutory appeal on the preemption issue pursuant to 28 U.S.C. § 1292(b) (1988). App. 42a.

In the Tenth Circuit, the United States, the Department of Transportation ("DOT") and the FAA filed a brief amicus curiae supporting Piper's contention that Cleveland's claims are preempted. Brief for the United States as Amicus Curiae, *Cleveland v. Piper Aircraft Corp.*, No. 91-2065 (10th Cir.) (hereinafter "U.S. Brief"). The Government argued that Cleveland's design negligence claims are preempted for two reasons. First, the 1958 Act and regulations thereunder constitute "an all-encompassing federal regulatory framework" over an area of "predominantly federal concern" which "indicates an affirmative congressional intent to occupy the field of air safety." U.S. Brief at 7. Second, state law standards of care would frustrate Congress' intent to advance "the twin goals of ensuring safety and promoting air commerce" through uniform national regulation. *Id.* at 16. The Government noted "[t]he predominant federal interest in air commerce, the need for uniform federal regulation and the lack of state history of exercising significant police power over the channels of air commerce," and the explicit recognition of the States, themselves, of the need for uniform federal regulation of aircraft design. *Id.* at 10. Thus, the Government concluded: "state law is preempted here because there is a dominant federal interest in the regulation of air commerce -- one that demands uniform regulation, that has remained beyond the ambit of the states' traditional police powers, and that is reflected in a pervasive, federal regulatory scheme." *Id.* at 11.

The court of appeals nevertheless affirmed. The court relied heavily on *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992): pointing to the express preemption provision enacted by Congress in section 105 of the Airline Deregulation Act of 1978 -- a provision covering the area of commercial

airline "rates, routes and services," 49 U.S.C. App. § 1305 (1988) -- the court held that section 105 negates implied preemption in the area of aircraft design standards. App. 10a-11a. The court also relied on the "savings clause" in section 1106 of the 1958 Act, 49 U.S.C. App. § 1506 (1988), which preserves "remedies now existing at common law or by statute" as evidence that Congress did not intend to occupy the field of airplane safety to the exclusion of state regulation. App. 7a. The court also noted that the 1958 Act refers to "minimum standards," inferring that FAA safety regulation is therefore only a "minimum check on safety" and that Congress did not intend to bar the States from adopting "additional or more stringent standards." *Id.* at 13a-15a. Finally, the court purported to find no conflict between federal law and respondent's claims, incorrectly stating that Cleveland presented evidence that Piper could have improved visibility without altering the tailwheel design simply by raising the rear seat and could have installed a rear seat shoulder harness without conflicting with federal regulations. *Id.* at 13a.[14]

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[14] The court of appeals erroneously stated that "Cleveland has presented evidence that Piper could have improved visibility without altering the tailwheel design simply by raising the pilot seat." App. 13a. Cleveland presented no such evidence. What the district court's opinion actually noted (App. 38a) was simply the off-hand speculation of one of Cleveland's experts during his pretrial deposition (which was not presented at trial) who said that it might be "possible" to raise the rear seat "to see almost level," but then admitted "I don't know. I haven't measured that."

Even this claim, however, challenges the considered design judgment of the expert federal agency. Moreover, there is no evidence that the Super Cub's rear seat could be raised without significantly altering the design and shape of the aircraft or that the FAA would approve such a modification.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW SERIOUSLY UNDERMINES THE FEDERAL REGULATION OF AIRCRAFT DESIGN

Federal law forecloses state law claims that an aircraft design expressly approved by the FAA is nevertheless negligent. Federal law leaves a role for state law remedies against an aircraft manufacturer, for example, where the manufacturer fails to comply with FAA certification and safety requirements or is negligent in manufacturing the airplane. But it does not permit a jury to apply common law to hold an aircraft manufacturer to the jury's own standards of safe design. The contrary holding below seriously undermines Congress' effort in the 1958 Act and predecessor statutes to establish uniform national standards for aircraft design.

Federal preemption, of course, is a matter of congressional intent and that intent may be implied:

> Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." . . . [E]ven where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress . . . .'"

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (first alteration in original) (citations omitted). The regulation of aircraft design is a field Congress intended to occupy, where a

state substantive role only can frustrate the congressional purpose.

The utility of an airplane lies in its ability to travel quickly over long distances. Air commerce would be inhibited if aircraft faced a patchwork of differing and conflicting design requirements throughout the various States. The fundamentally national characteristics of airplanes and air travel led to the early and continuing recognition of the dominant federal interest in aviation:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is extensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel under an intricate system of federal commands.

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring), *quoted in Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973). In particular, the federal courts have recognized Congress' intent to establish uniform federal air safety regulation. As the First Circuit recently observed:

> The legislative history of the [1958] Act stressed the importance of a single uniform system of regulation, especially with regard to air safety. The House Report explained, in a section entitled "Purpose of Legislation," that "[t]he administration of the new Federal Aviation Agency (1) would be given *full responsibility and authority* for the . . . promulgation and enforcement of safety regulations . . .. " H.R. Rep. No. 2360, 85th Cong., 2d Sess., 22, *reprinted in* 1958 U.S.Code Cong. & Admin.News 3741, 3741 (emphasis supplied). In a letter to the House Committee on Interstate and Foreign Commerce, included as part of the House Report, a representative for the Executive Branch characterized the impetus behind the proposed legislation as follows:

> It is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation.
>
> *Id.* at 3761.
>
> In sum, establishment of a single uniform system of regulation in the area of air safety was one of the primary "object[s] sought to be obtained" by the passage of the Act. *Schneidewind*, 108 S.Ct. at 1150.

French v. Pan Am Express, Inc., 869 F.2d 1, 5 (1st Cir. 1989) (alterations in original).[15]

The decision below, permitting state-by-state or, indeed, jury-by-jury rejection of considered aircraft design determinations of the expert federal agency, is wholly contrary to Congress' clear objective.

II. THE DECISION BELOW MISCONSTRUES AND CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. The Court Below Misconstrued *Cipollone*

The error below resulted largely from the court of appeals' misuse and misconstruction of this Court's *Cipollone* decision. First, the court erroneously relied on *Cipollone*'s admonition that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" 112 S.Ct. at 2617 (alterations in original). This case involves no historic state police power. Aircraft design is not "a subject traditionally governed by state law . . .." *CSX Transportation, Inc. v.*

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[15] *See Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 404 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Airline Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960).

Easterwood, 113 S. Ct. 1732, 1737 (1993).[16] To the contrary, the States, through their legislatures, have expressly recognized the need for "uniform" federal aircraft design regulation. *See* pp. 4-6, above. Preemption of Cleveland's common law negligent design claims does not supersede historic state police powers; rather it vindicates both federal *and* state policy.

The court below also misapplied the statement in *Cipollone* that an explicit preemption provision generally negates, under the maxim *expressio unius est exclusio alterius*, implied preemption of matters not covered by the express provision. *See* 112 S.Ct. at 2618. When enacted, the 1958 Act contained no express preemption provisions whatsoever, and it addressed two broad and distinct areas of air regulation: (1) flight safety, regulated by the FAA; and (2) commercial airline operations, regulated by the CAB. Twenty years after the 1958 Act, Congress enacted the Airline Deregulation Act of 1978. As its title indicates, the 1978 Act amended the 1958 Act only with respect to the second area of concern: commercial airline operations. The express preemption provision of the 1978 Act on which the court below relied, section 105, 49 U.S.C. App. § 1305(a), bars the States from enforcing laws "relating to rates, routes or services of any air carrier." There is no reason whatsoever to infer, from this preemption provision added twenty years later and applicable only to an entirely different body of law, that Congress did *not* intend to occupy the field of aircraft design regulation.[17]

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[16] *Cf. Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (in an area of uniquely federal interest a conflict between federal policy and state law "need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.'") (citation omitted).

[17] Relying on the Tenth Circuit's decision in this case, the Eleventh Circuit in *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 294-95 (11th Cir. 1993), recently made precisely this same mistake. Under the misreading of *Cipollone* by the court below and by the Eleventh Circuit in *Lake Aircraft*, the 1958 Act would never have an implied preemptive effect. *But see Burbank*, 411 U.S. at 633 (the "pervasive nature of the scheme of federal regulation of aircraft noise"

B. The Lower Court's Reliance on the "Savings Clause" Ignores Several Decisions of this Court

The court below misread the "savings clause" in section 1106 of the 1958 Act[18] and concluded that "Congress has intended to allow state common law to stand side by side with the system of federal regulation it has developed." App. 12a. That holding is at odds with the text and purpose of the Act and this Court's precedents.

On its face, section 1106 preserves only "*remedies* now existing" (emphasis added).[19] Nothing in this provision suggests that Congress intended to preserve a power of the States to promulgate substantive standards of care for aircraft design -- a power no State has tried to exercise since at least the early 1930s. As the United States argued below, this "holding would allow common law duties of care to displace the elaborate and exclusive federal scheme for regulating design safety." U.S. Brief at 20. The United States thus concluded:

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indicates intent to preempt); *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989) (implied preemption of state drug testing rules as applied to pilots); *Northwest Airlines, Inc. v. Gomez-Bethke*, 34 Fair Empl. Prac. Cas. (BNA) 837 (D.Minn. 1984) (implied preemption of state law requiring airline to permit chemically-dependent pilot to return to work).

[18] Section 1106 provides: "Nothing contained in this chapter shall in any way abridge or alter remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. App. § 1506 (1988).

[19] In 1958, section 1106 was reenacted without substantive change from the 1938 Act. *See* 52 Stat. 1027. The court of appeals was clearly wrong in its contention that common law design defect claims, particularly such claims against aircraft manufacturers, were known and "now existing" in 1958. App. 8a. *Cf. Wood v. General Motors Corp.*, 865 F.2d 395, 404-06 (1st Cir. 1988), *cert. denied*, 494 U.S. 1064 (1990) (design defect claims against automobile manufacturers were "virtually non-existent" in 1966). It is even more clearly wrong as of 1938.

> The statute, when read as a whole, instead shows that Congress intended to preempt state law standards of care, but to preserve state damage remedies for any injuries caused by violation of a *federal* design standard. An injured party would thus retain, as the act's savings clause requires, the full panoply of compensatory remedies for a manufacturer's violation of an applicable standard of design safety. Those remedies, however, would be exercised in a manner that furthers compliance with federal safety standards. The resulting narrow preemption of state law would thus give full and complete effect to the savings clause while vindicating Congress' intent to occupy the field of aircraft design safety.

Id. (emphasis in original).[20]

The court's reliance on the savings clause ignores this Court's instructions that a general savings clause is to be read with care and does not overcome more specific evidence that Congress intended certain claims to be preempted. *See Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2037 (1992); *International Paper v. Ouellette*, 479 U.S. 481, 494 (1987);

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[20] *See Bieneman v. City of Chicago*, 864 F.2d 463, 471-73 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989):

> [Section 1106 will] save common law remedies even when federal law exclusively determines the content of substantive rules.
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> . . . .
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> A state court could not award damages against O'Hare or its users for conduct required by [federal] regulations, or for not engaging in noise-abatement procedures that the Federal Aviation Administration considered but rejected as unsafe. . . . These subjects are governed by federal law, and a state may not use common law procedures to question federal decisions or extract money from those who abide by them.

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328-31 (1981); *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907). *See also Wood*, 865 F.2d at 414-16.

C. The Decision Below Misread Section 601 and Conflicts with *Ray v. Atlantic Richfield*

Under section 601 of the 1958 Act, the Secretary of Transportation, through the FAA, has the duty to prescribe and revise "[s]uch minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers *as may be required in the interest of safety*[.]" 49 U.S.C. App. § 1421(a)(1) (1988) (emphasis added). Erroneously reading this congressional mandate to require only the "promulgation of 'minimum standards,'" App. 13a, and disparagingly suggesting that "FAA certification is, by its very nature, a minimum check on safety," *id.* at 15a,[21] the court concluded that by "designating the standards as minimum, Congress indicated that it did not want to bar states from adopting additional or more stringent standards." *Id.*

This holding ignores the statutory provision that federal design standards shall be those "required in the interest of safety," and the teachings of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). *Ray* held that a state statute purporting to establish state "standard safety features" for oil tankers was impliedly preempted by provisions of the Ports and Waterways Safety Act of 1972, Pub. L. 92-340, 86 Stat. 424 (1972), which charged the Secretary of Transportation with promulgating "comprehensive minimum standards of design, construction, alteration and maintenance and operation" of tankers. 435 U.S.

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[21] The court's suggestion that FAA certification procedures are defective because, in certain circumstances, the FAA delegates some inspection responsibility to designated aircraft company employees meeting FAA qualifications, is wholly unsupported. Moreover, in this case it is wholly irrelevant. The agency itself made the decisions at issue here.

at 161. Pursuant to the federal statute, the Secretary promulgated regulations and inspected and certificated tankers. *See* 435 U.S. at 160-63. From this statutory scheme, this Court inferred

> that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.

Id. at 163. This Court then expressly rejected the argument that the federal act's reference to "minimum standards," was a "recognition of state authority to impose higher standards than the Secretary has prescribed." *Id.* at 168 n. 19.

The decision below conflicts with *Ray*. The 1958 Act charges the Secretary with promulgation of "such minimum standards governing the design, materials, workmanship, construction and performance of aircraft . . . as may be required in the interest of safety." 49 U.S.C. App. § 1421(a). The FAA has promulgated "comprehensive" regulations pursuant to this charge. *Varig Airlines*, 467 U.S. at 805. The three-level certification process is designed to ensure compliance. As in *Ray*, this statutory scheme makes clear that Congress "intended uniform national standards," set by one federal agency alone, for the design and construction of safe aircraft that "foreclose the imposition of different or more stringent state requirements." *Ray*, 435 U.S. at 163.

D. Cleveland's Claims Conflict With Federal Law

The different or more stringent design requirements Cleveland seeks to impose here through a jury verdict under common law are preempted because they conflict with the "evident congressional intention to establish a uniform federal regime controlling the design" of aircraft. *See Ray*, 435 U.S. at

165.[22] The court below, however, purported to find no conflict between Cleveland's two negligent design claims and federal tailwheel design and shoulder harness decisions because, it believed, Piper could have simply raised the rear seat of the Super Cub to improve preflight visibility and installed a rear seat shoulder harness without conflicting with these federal decisions. This is actually saying that the expert federal agency's design decisions were wrong and unsafe.

There is, in fact, a real conflict between Cleveland's design claims and federal law. The FAA is well aware of Cleveland's design proposals, but it does not accept them as required for safety. If Piper, in the wake of an adverse jury verdict in this case, wanted to make the design changes urged by Cleveland in order to avoid future liability, it could not do so without FAA action. Piper could not change the design of the Super Cub without FAA approval, *see* 14 C.F.R. § 21.113 (1992), nor would it be permitted to recall the thousands of Cubs and Super Cubs in service which hold valid Airworthiness Certificates. When the FAA does think a retroactive design change is required, it imposes that burden on the aircraft owners. Only the FAA could require the owners of these in-service aircraft to modify their aircraft or install rear seat shoulder harnesses. Thus, a very real conflict exists here: Piper itself could not respond to the "potent method of governing conduct and controlling policy," *Garmon*, 359 U.S. at 247, exerted by Cleveland's common law negligent design claims. Only the FAA could order the changes that Cleveland would have a common law jury require of Piper.

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[22] As the court of appeals acknowledged, a damage award premised on a supposed design deficiency can have the same effect as an explicit regulatory requirement. App. 5a-6a. *See, e.g., Cipollone*, 112 S.Ct. at 2620 ("'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" (*quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959))).

The court below made yet another error in concluding that there is no conflict between federal "minimum standards" and additional or more stringent state standards because the purpose of both is promoting safety. App. 14a. Here, the court ignored the holding in *Ouellette*:

> In determining whether Vermont nuisance law "stands as an obstacle" to the full implementation of the [Clean Water Act], it is not enough to say that the ultimate goal of both federal law and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

479 U.S. at 494; *accord Gade v. National Solid Waste Man. Ass'n*, 112 S.Ct. 2374, 2385-86 (1992).

In the 1958 Act, Congress charged the FAA with the duty to provide for safety in civil aviation and the responsibility to "foster" the growth and development of civil aviation. H.R. Rep. No. 2360, 85th Cong., 2d Sess., 1 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741. Congress' chosen method to achieve these goals is to give "full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations" to the FAA. *Id.* Performance of its duties under the 1958 Act requires the FAA to "delicate[ly] balance" complex and competing considerations, including the advantages and disadvantages of various aircraft designs and trade-offs between additional safety features and utility, performance and increased costs. *See Burbank*, 411 U.S. at 638-39; *Ouellette*, 479 U.S. at 495-97.[23] Permitting juries to impose differing design standards on an ad hoc basis pursuant to a "variety of common-

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[23] *See also* FEDERAL AVIATION AGENCY, POLICY STATEMENT OF THE FEDERAL AVIATION AGENCY 20 (1965) ("It is simply not possible to pursue safety for safety's sake in an effort to achieve the highest level of safety without being seriously limited by the compromises necessary in the interest of a reasonably costed, efficient and viable system.")

law rules established by the different states," *Ouellette*, 479 U.S. at 496, clearly would interfere with the method by which Congress sought to achieve the twin goals of the 1958 Act, lead to a "chaotic confrontation" among the various States and the Federal Government, and "undermine [the] regulatory structure." *Id.* at 496-97.

III. THIS FEDERAL PREEMPTION ISSUE IS OF PARTICULAR IMPORTANCE TO GENERAL AVIATION CONSUMERS AND MANUFACTURERS, AS WELL AS TO THE FEDERAL AVIATION ADMINISTRATION

The importance of this issue is demonstrated by the support for Piper's position from all segments of the general aviation industry. General aviation manufacturers understandably support Piper because of the deleterious impact product liability lawsuits have had upon the industry. More significant is the support of general aviation consumers with their different perspective and divergent interests. As explained by the Aircraft Owners and Pilots Association ("AOPA") in its amicus brief below:

> AOPA is the largest organization of general aviation consumers in the world. It is a nationwide not-for-profit membership association of some 300,000 individual aircraft owners and pilots. . . . Thousands of AOPA's members own and/or fly Piper Cub and similar tail dragger aircraft.
>
> It might appear on the surface that a general aviation consumers organization like AOPA must favor expansive treatment and interpretation of product liability law and would tend to oppose any federal preemption of common law product liability claims. After all AOPA members are the victims of defective aviation products and are entitled to just compensation for injuries caused by such products. On the other hand, as aviation users, AOPA's members must have access not only to safe but to reasonably priced aviation products if they are to continue to fly.

> Expansive and indiscriminate application of product liability law threatens to destroy the general aviation industry and to deprive AOPA's members of competitive product sources.
>
> . . . .
>
> AOPA is concerned that [the district court's result], if allowed to stand, would permit juries throughout the nation to require the ad hoc redesign of aircraft (previously certified by the federal expert agency) to meet whatever supplemental standards a jury might from time to time decide to impose. It is difficult to see how any aircraft manufacturer could long remain in business under such restraints. We note that the basic design of the Piper Cub is not new. The general safety and airworthiness of the airplane has been established (by AOPA members and others) over a period of some 50 years.

Brief of Aircraft Owners and Pilots Association, Amicus Curiae, *Cleveland v. Piper Aircraft Corp.*, No. 91-2065 (10th Cir.) at 3-4.

Finally, the views of the United States, DOT and FAA make clear the importance of this issue and the necessity of review by this Court:

> This case concerns a state's power to impose, through the medium of a common law tort action, its own substantive standards of care for aircraft design. As such, it raises issues that directly affect an area that is and has been one of paramount federal concern.
>
> In our view, the federal government has exclusive authority over air safety, and the common law duty of care plaintiffs seek to impose on the defendant aircraft manufacturer is therefore preempted by federal law. Air commerce, by its very nature, transcends state boundaries and is a matter of dominant federal interest. It cannot remain safe and continue to grow if every

> plane that rises into the airways is subjected to a multitude of different -- and potentially conflicting -- state standards of care.

U.S. Brief at 1-2.

This case presents important and special reasons for review by this Court. It is important because of the serious adverse impact of the decision below on the congressional scheme for the federal regulation of aircraft design and its goals of aviation development and safety through uniform national standards. It is special because of the rare consensus for preemption it produces from all of the principal representatives of the general aviation community: the consumers, the manufacturers and the FAA. It is important and special because of the absence of federal-state conflict: the States, like Congress, long ago recognized and agreed on the necessity of uniform federal aircraft design regulation.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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